

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHELLY NISSEN-SWEET

Claimant

V.

SOUTHWEST CAGING CORP.

Respondent

AND

**HARTFORD CASUALTY INSURANCE
COMPANY and TRAVELERS**

INDEMNITY COMPANY OF AMERICA

Insurance Carriers

Docket No. 1,070,408

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 20, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Duncan A. Whittier of Topeka, Kansas, appeared for claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for respondent and its insurance carrier Travelers Indemnity Insurance Company of America. Patricia A. Wohlford of Overland Park, Kansas, appeared for respondent and its insurance carrier Hartford Casualty Insurance Company.

The ALJ found claimant's date of injury by repetitive trauma to be June 14, 2012, and determined claimant provided timely notice to respondent. The ALJ found claimant's job duties are not the prevailing factor for her left upper extremity complaints, and thus claimant's injury by repetitive trauma did not arise out of and in the course of her employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 20, 2015, Preliminary Hearing and exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues her injury by repetitive trauma arose out of and in the course of her employment with respondent. Claimant contends this matter should be remanded to the

ALJ for further orders regarding medical treatment and temporary total disability compensation.

Respondent maintains claimant did not provide notice of a series of injuries culminating on or about June 14, 2012. Further, respondent argues claimant did not establish she sustained an injury by repetitive trauma arising out of and in the course of her employment with respondent, nor was the prevailing factor for claimant's left upper extremity condition her work activities at respondent.

The issues for the Board's review are:

1. Did claimant provide timely notice of an injury by repetitive trauma?
2. Did claimant sustain an injury by repetitive trauma arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent beginning August 8, 2005, as a mail opener, sorting and bundling thousands of pieces of mail per hour. Claimant continued in this position until June 14, 2012, when she was terminated by respondent. Claimant testified she was given no reason for her termination. Cathy Brading, respondent's plant manager, testified claimant was terminated for insubordination and negative behavior and was not eligible for rehire. Ms. Brading stated she had no complaints regarding claimant's job performance, and claimant "was one of the higher piece rate employees."¹

Claimant testified she informed her direct supervisor, Stephanie Sandgren, of pain and shaking in her hands on May 8, 2012. Ms. Brading indicated it is respondent's policy to immediately send any worker who has reported an injury to a doctor, and claimant was sent to Stormont-Vail WorkCare for evaluation on May 9, 2012. Claimant testified she complained of hand pain. Her complaints were confirmed by David L. Couch, ARNP, who noted complaints of sharp pain in her left hand and thumb and pain in her left wrist.² After performing a physical examination, Mr. Couch, who is not a physician, released claimant to return to work with no restrictions, noting "[t]his problem is not related to work activities."³

Claimant testified she again requested medical treatment for her hands prior to her termination, but was denied. Ms. Brading had no recollection of claimant indicating she had ongoing medical issues with her hands following the initial claim. Ms. Brading stated

¹ P.H. Trans. at 45.

² *Id.*, Cl. Ex. 2 at 2.

³ *Id.* at 3.

she notified respondent's workers compensation insurance carrier on May 8, 2012, that claimant had a left arm and wrist injury from repetitive movement.

Claimant began employment in the deli department of Gene's Heartland Foods on May 28, 2013. In this position, claimant performed heavy lifting and repetitious activities, including using a meat slicer, on a daily basis. Claimant filed a workers compensation claim related to this employment, claiming a series of injuries to her back, neck, and right side, including her shoulder, elbow, wrist, hand, knee, and ankle. This claim was ongoing at the time of the preliminary hearing.

Claimant began treating with Kathy Douglas, APRN-BC, of the Wamego Family Health Center, for primary care in 2013. On June 19, 2013, claimant reported numbness and tingling in her thumbs.⁴ On July 21, 2014, claimant reported pain in her left thumb for the last two years to Dr. Roland Darey, also with Wamego Family Health Center.⁵ Dr. Darey diagnosed claimant with rheumatoid arthritis in August 2014.

Claimant's counsel referred her to Dr. Pedro Murati for an evaluation on August 26, 2014. Claimant complained of pain, numbness, burning, and tingling in her left hand, pain in her thumb, difficulty pinching with fingers due to left hand pain, and left hand pain which goes into the forearm. Dr. Murati reviewed claimant's history and available medical records. Claimant denied any significant injuries to her left hand, fingers, and wrist prior to her employment with respondent.

After performing a physical examination, Dr. Murati determined claimant sustained left carpal tunnel syndrome as a direct result of her work-related injury with respondent on June 14, 2012. Dr. Murati wrote:

The claimant sustained multiple repetitive traumas at work which resulted in left wrist pain. . . . She has no significant pre-existing injuries that would be related to her current diagnoses. . . . Even though there is a recent diagnosis of Rheumatoid arthritis and this disease process can produce [carpal tunnel syndrome], it usually happens in advanced cases where there is extensive pathology. This claimant is in the beginning stages of this disease which is evident in the lack of findings that would be ascribed to a rheumatoid condition. Apparently, on this claimant's date of injury she sustained enough permanent structural change in the anatomy of her left wrist which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the multiple repetitive traumas at work.⁶

⁴ See P.H. Trans., Resp. Ex. B at 28.

⁵ See P.H. Trans., Resp. Ex. C at 53.

⁶ P.H. Trans., Cl. Ex. 1 at 3-4.

Dr. Anne Rosenthal evaluated claimant on May 12, 2015, at respondent's request. Claimant complained of stiffness, numbness, tingling, and pain in both hands and wrists.⁷ After reviewing claimant's history, medical records, and performing a physical examination, Dr. Rosenthal determined claimant had rheumatoid arthritis, hypothyroidism, and probable left carpal tunnel syndrome. Dr. Rosenthal noted claimant complained only of pain and denied any injury on May 9, 2012. Claimant's first complaints of numbness and/or tingling were documented in June 2013. Dr. Rosenthal wrote:

This is one year after she ended employment at [respondent] and is clearly not related to any work that she did at [respondent]. Furthermore her bilateral hand numbness and tingling began a month or two after she started working for Gene's Heartland Foods which she describes as a repetitive hand intense job as well. They also began when she woke up in the morning which also means that her sleep position may be a contributing factor along with her body habitus.

With regard to the morning stiffness, hand stiffness and pain it is related to her rheumatoid arthritis which is a personal medical condition and not vocationally related. Her complaints of hand pain are classic for rheumatoid arthritis especially her complaint of her hands feeling stiff and tight in the morning. She does need to be evaluated by a rheumatologist

[Claimant's] work related injury of June 2012 while employed at [respondent] was not the prevailing factor in causing her complaints with regard to her left upper extremity.⁸

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

⁷ See P.H. Trans., Resp. Ex. A at 7.

⁸ *Id.* at 7-8.

K.S.A. 2011 Supp. 44-520 states, in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

K.S.A. 2011 Supp. 44-508(f) states, in part:

(2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2011 Supp. 44-510c(b)(2)(C) states:

If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

Ms. Brading testified her first notice claimant was making a claim for an injury was May 8, 2012. As a result of the notice, Ms. Brading sent claimant to Stormont-Vail WorkCare, where she was examined by Mr. Couch. The undersigned agrees with the ALJ's finding respondent had timely notice of an injury by repetitive trauma pursuant to K.S.A. 2011 Supp. 44-520.

Claimant complained of left hand and thumb pain to Mr. Couch on May 8, 2012. These symptoms were written off as not work-related by Mr. Couch. On June 19, 2013, claimant complained of numbness and tingling in her thumbs. Dr. Murati noted complaints of pain, numbness and tingling in claimant's left hand. Dr. Murati diagnosed left carpal tunnel syndrome. When claimant was examined by Dr. Rosenthal on May 12, 2015, she

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2014 Supp. 44-555c(j).

complained of numbness and tingling in her hands with pain in the index and long fingers of both hands. Dr. Rosenthal noted probable left carpal tunnel syndrome.

Based upon the foregoing, it is apparent claimant began having left hand symptoms while employed with respondent.

CONCLUSION

Respondent had timely notice of an injury by repetitive trauma pursuant to K.S.A. 2011 Supp. 44-520. Claimant has met the burden of proving her work activities with respondent are the prevailing factor causing her left carpal tunnel syndrome.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 20, 2015, is reversed and remanded for further orders consistent with this Order, relating to medical treatment and temporary total disability, including whether claimant was terminated for cause.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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